No. 78-1222

IN THE

Supreme Court of the United States

October Term, 1978

Western Communications, Inc., *Petitioner*,

v.

Federal Communications Commission and
Las Vegas Valley Broadcasting Co., *Respondents*.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The District of Columbia Circuit

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PETITIONER'S REPLY TO BRIEFS IN OPPOSITION

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April 18, 1979

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In their briefs in opposition to the Petition for Writ of Certiorari, neither the FCC nor Valley has overcome Petitioner's showing that there are multiple reasons for granting the writ.

1. There is an important Federal question presented as to the duty of Courts of Appeals to require administrative agencies to provide rational explanations for disparate treatment in comparable cases. The error of the Court of Appeals here may not be avoided by re-

liance in the briefs in opposition on agency reasons that the Court of Appeals never considered or by other *post hoc* rationalizations of the record or the precedents. Nor do asserted differences between the nature of FCC and SEC regulation eliminate the evident conflict between the District of Columbia and Second Circuits on this question.

As to sanctions, the issue is not whether agencies generally have discretion in choosing them (FCC Br. 8-10; V. Br. 22-23), but whether in this case there was adequate judicial review, as required by ***Melody Music, Inc.* v. *FCC,*** 120 U.S. App. D.C. 241, 345 F.2d 730 (1965), to prevent agency abuse of its discretion. The failure of the Court of Appeals to engage in meaningful review in this case—even failing to address or to cite Petitioner's reliance on ***Melody Music***—has been highlighted by the District of Columbia Circuit's decision only last week, in another FCC license renewal case, which expressly reaffirmed the ***Melody Music*** doctrine "as sound." ***White Mountain Broadcasting Co.* v. *FCC,*** No. 76-2009, slip op. at 9 (D.C. Cir. April 9, 1979). ***White Mountain*** reiterated that a reviewing court must require the FCC to explain disparate treatment unless the differences in the misconduct at issue are "so obvious as to remove the need for explanation." ***Id.,*** quoting ***Melody Music.*** If the FCC seeks to rely on factual differences, the court must require the agency to explain "the relevance of the differences to the Commission's purposes and those of the Federal Communications Act." ***Id.*** at 8. The Court of Appeals did not follow or apply these fundamental principles in the instant case.

That the FCC had claimed in its decision that factual differences justified different treatment for Petitioner than that afforded other licensees in similar prior cases (FCC Br. 8-10; V. Br. 22) is beside the point. Particularly in the face of Petitioner's strong contentions, the Court of Appeals had a duty to determine whether the differences claimed by the FCC were relevant to the agency's purposes and the Communications Act. It failed to do so. The Court of Appeals did not even purport to rely on the FCC's explanation of such differences, or to find, as it did in ***White Mountain,*** that the differences were so "obvious" as not to require explanation.[1] Also inapposite is the claim in the FCC's brief in opposition that subsequent agency cases are "readily distinguishable" from this case (FCC Br. 8 n.10). Counsel's *post hoc* rationalizations here are not a substitute for the required meaningful judicial review below to determine whether the differences were so great as to obviate the need for agency explanation.[2]

Most importantly here, the ***Melody Music*** requirement is not limited to disparate sanctions, but applies to other disparate treatment as well.[3] Therefore, to

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[1] *Compare also* Barnum v. National Transportation Safety Board, No. 77-1957 (D.C. Cir. March 14, 1979), where the court took nine slip opinion pages to explain its judicial review of the claim that a 150-day suspension of a commercial pilot certificate was an abuse of agency discretion because similar conduct in other cases had resulted in only 30-day suspensions.

[2] Petitioner invited to the attention of the Court of Appeals various FCC cases decided after Petitioner's case which were inconsistent with the treatment given Petitioner by the FCC. The Court of Appeals should have required the FCC to square its reasoning in these other cases with its action concerning Petitioner. It did not do so.

[3] *E.g.,* Public Media Center v. FCC, —— U.S. App. D.C. ——, 587 F.2d 1322 (1978); Columbia Broadcasting System, Inc. v. FCC, 147 U.S. App. D.C. 175, 454 F.2d 1018 (1971). *See also*

whatever degree *FCC* v. *WOKO, Inc.*, 329 U.S. 223 (1946), and *Butz* v. *Glover Livestock Commission Co.*, 411 U.S. 182 (1973), suggest agency flexibility on sanction, they do not excuse the Court of Appeals' failure to insist that the FCC explain why it did not consider or credit Petitioner's defenses and claims of mitigating factors when these same defenses and factors had been held decisionally significant in other cases, namely (a) reliance on legal counsel, (b) absence of the required element of *scienter* in connection with alleged fraud, (c) restitution, and (d) corrective and preventive action (Pet. 21-22).[4] The Court of Appeals and the briefs in opposition have completely overlooked this second important branch of Petitioner's disparate treatment/*Melody Music* claim.

Analysis shows that the asserted factual differences relied on by the FCC below, but not addressed by the Court of Appeals, either did not exist or had no relevance to the Commission's purposes and those of the Communications Act. For example:

(a). Although the station in *Channel 13 of Las Vegas, Inc.*, 37 F.C.C.2d 518 (1972), may not have clipped "commercials" (Pet. App. 26a), it did clip *other* "advertising" matter. The fraudulent billing rule (Pet. App. 165a) applies to all "advertising" whatever its form, and in *Channel 13* the FCC expressly

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Atchison, T.&S.F.R. Co. v. Wichita Board of Trade, 412 U.S. 800, 808 (1973) (plurality opinion): an agency has a "duty to explain its departure from prior norms."

[4] Nothing in the decisions below suggests that witness "credibility" (V. Br. 23) affected rulings on Western's defenses and mitigating factors.

rejected the claimed distinction between "commercials" and *other* "advertising" matter.[5]

(b). *WEAU, Inc.*, 50 F.C.C.2d 659 (1975), cannot be distinguished on the stated ground that "the licensee's principals took immediate steps to eliminate clipping and fraudulent billing on discovery of the wrongdoing," while allegedly Petitioner did not (Pet. App. 26a n.9). The official reports of *WEAU* show that commercial clipping and false bills to NBC were "repeatedly" brought to the attention of the licensee's principals, but they "persistently failed to take any meaningful action," despite specific complaints of *commercial* clipping, until after designation of hearing. 50 F.C.C. 2d at 680-82.[6]

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[5] The fraudulent billing in *Channel 13* was more, not less, extensive and egregious than that alleged at KORK-TV. In *Channel 13* at least 27 advertising credits were clipped over a 20-day period, 37 F.C.C.2d at 518; at worst, the *record* evidence suggests KORK-TV overbilled NBC for 21 commercials over a 35-day period. Only nine weekly bills from KORK-TV to NBC during the three-year license period are in the record. While Petitioner has never denied that these reports may have been "inaccurate" (FCC Br. 2 n.1) in failing to disclose clipping of *clutter*, the only "proof" that KORK-TV "overbilled NBC" for *advertising* (*id.*) is based on the highly questionable log comparisons *plus* these few reports. Valley's supposed showing that KORK-TV clipped 250 network commercials (V. Br. 19) is meaningless under the fraudulent billing issue because the record contains no bills to NBC claiming credit for the allegedly missed commercials (Pet. App. 70a).

[6] None of Petitioner's officers, directors, or stockholders knew or believed commercials were being clipped without notice to NBC, there were no complaints of commercial clipping, the second station manager stopped all clipping (even of clutter) promptly after taking over, no further clipping took place, and stringent new controls were established before any FCC investigation or hearing order.

(c). The FCC's claim that fraudulent billing in *Blackstone Broadcasting Corp.,* 52 F.C.C.2d 1106 (1975), was "limited [in] scope," while Western's was "protracted and flagrant" (Pet. App. 25a) does not withstand scrutiny. The record in *Blackstone* involved more than 45 false invoices over more than *six years,* 52 F.C.C.2d at 1117; the record here suggests no more than nine erroneous NBC bills in three years.[7] The FCC said *Blackstone* involved only a "nominal amount of money" (Pet. App. 25a), yet, at worst, the record here suggests overcharges to NBC of some $325 (Pet. App. 21a n.7). The FCC said Petitioner's "disregard" for the rule rendered *Blackstone* inapposite (Pet. App. 25a). But neither KORK-TV station manager knew or believed that commercials were being clipped (Reynolds did not know about even clutter clipping), whereas false bills were issued in *Blackstone* at the specific direction of the *president* and *principal stockholder.*

(d). The FCC said *Bluegrass Broadcasting Co.,* 43 F.C.C.2d 990 (1973), involved only a station "general manager" whereas KORK-TV's general managers were also "officers and directors" (Pet. App. 25a). However, FCC precedent says such a distinction is immaterial.[8] The *Bluegrass* general manager deliberately overbilled some $36,000 in seven months—a sum 100 times greater than the KORK-TV error suggested by

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[7] That *Blackstone* involved false "invoices" rather than "affidavits" (Pet. App. 25a) is immaterial under a rule proscribing "false documents." *See* Empire Broadcasting Corp., 63 F.C.C.2d 634 (1977).

[8] *See* United Broadcasting Co. of Florida, 55 F.C.C.2d 832, 838 n.13 (1975), citing Continental Broadcasting, Inc., 15 F.CC.2d 120, 129 (1968), *recon. denied,* 17 F.C.C.2d 485 (1969), *aff'd,* Continental Broadcasting, Inc. v. FCC, 142 U.S. App. D.C. 70, 439 F.2d 580, *cert. denied,* 403 U.S. 905 (1971).

the record. The FCC said Bluegrass had received no "complaints or other facts" to alert its principals to "wrongdoing" (Pet. App. 25a); however, the four KORK-TV "program content" complaints were no warning about possible clipped *commercials* to anyone.

Claimed distinctions (FCC Br. 8 n.10) between subsequent FCC cases and this case are illusory and overlook important facts. For example:

(a). In *Microband Corp. of America,* 44 P&F Radio Reg.2d 1490 (1978), the FCC did find that inaccurate statements made to the FCC by a licensee were not a result of intent to mislead or conceal facts. In the instant case, however, the FCC refused even to consider, let alone credit, the primary factor that negated such an intent by Petitioner—reliance on expert former legal counsel who interpreted FCC inquiries and drafted Petitioner's answers (Pet. 21).[9]

(b). In *CBS, Inc.,* 69 F.C.C.2d 1082 (1978), the misconduct was hardly "isolated." One or more top CBS officers *repeatedly* lied to the FCC, 69 F.C.C.2d at 1090-93, and the programs at issue were broadcast over a period of more than *two years. CBS, Inc.,* 67 F.C.C.2d 969 (1978).[10] Moreover, CBS's policy to promote the

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[9] This disparity of treatment is aggravated by the FCC's willingness to credit reliance on counsel and other defenses and mitigating factors in *Microband* (and other cases), but not in this case (Pet. 21-22). In *White Mountain* v. *FCC, supra,* the Court of Appeals noted that the FCC permits mitigating circumstances to affect the outcome of license renewal cases even when misconduct is found to have occurred. Slip op. 12-13.

[10] The assertion that CBS's misconduct "was not directly related to any individual stations owned by the network" (FCC Br. 8 n.10) is unconvincing since the tennis matches were broadcast by, among others, all five television stations owned and operated by the network!

tennis matches and otherwise to act in a manner later held to have misled the public and violated FCC rules was no less "deliberate" than KORK-TV's policy of clipping clutter. Moreover, like CBS's conduct, KORK-TV's practice of clipping *clutter* was at the time (1968-71) of "debatable legality in terms of the FCC rules . . .," *see White Mountain, supra,* slip op. at 12, and was not held to violate FCC rules until long after it was stopped (Pet. 5). The FCC has excused other licensees on this ground. *E.g., Hubbard Broadcasting, Inc.,* 41 P&F Radio Reg.2d 979 (1977).

(c). The claim that *Tupelo Broadcasting Co.,* 67 F.C.C.2d 1358 (1978), "involved isolated misconduct that did not result from a deliberate policy adopted by the licensee" (FCC Br. 9) overlooks the facts that the station in *Tupelo* (a) regularly deleted commercials for *four years,* (b) accepted payment in full for the deleted commercials, (c) avoided violating the fraudulent billing rule only by the fortuity that the advertising agency did not require performance affidavits (the equivalent of weekly reports to the network) as a precondition to payment, (d) did eventually violate the fraudulent billing rule as a direct result of its policy of deleting commercials, and (e) was credited for ultimately making restitution for the deleted commercials in the amount of $4,218.75. 67 F.C.C.2d at 1367-68.

The foregoing illustrations show that there is considerably more substance to Petitioner's disparate treatment/*Melody Music* point than suggested either by the failure of the Court of Appeals to address it, or by the abbreviated glossing-over of the point in the briefs in opposition. Contrary to the contentions in the briefs in opposition, this case offers the Court an excellent, and much needed, opportunity to define the role

of judicial review of disparate agency action (including disparate imposition of an agency's ultimate sanction). Agency discretion must be guided by reasoned decision-making and judicial review must carefully test the reasons asserted by the agency for its action. Those principles were not followed in the instant case.

Nor have the briefs in opposition overcome Petitioner's showing that Supreme Court review is appropriate to resolve an apparent conflict between circuits involving this case and *Arthur Lipper Corp.* v. *SEC,* 547 F.2d 171 (2d Cir. 1976), *rehearing denied,* 551 F.2d 915 (1977), *cert. denied,* 434 U.S. 1009 (1978). That the schemes of FCC and SEC regulation may be different (FCC Br. 9 n.11) does not justify a different standard for judicial review of the agencies' exercise of their discretion and power. No authority is cited to demonstrate that the Congress contemplated closer judicial scrutiny of SEC actions than of FCC actions. In *Lipper* the Second Circuit struck a balance between agency discretion and judicial review; in this case the District of Columbia Circuit failed fully to perform its role of judicial review and allowed the scale to tip completely in favor of agency discretion.

2. It is important for the Supreme Court to settle whether "clear and convincing" evidence or mere "preponderance" of the evidence is the correct standard of proof in FCC proceedings that terminate broadcast licenses for alleged misconduct. Since the Congress has not decided this point, the judiciary should address it explicitly.[11] The absence of any property interest in a

[11] As this Reply goes to press, Sea Island Broadcasting Corp. v. FCC, No. 76-1735 (D.C. Cir., filed Aug. 12, 1976), remains pending. Accordingly, Petitioner renews its request (Pet. 12 n.6) that

broadcast license and the technically "non-penal" nature of denial of license renewal do not distinguish this case from others in which "clear and convincing" has been held the proper standard of proof.

The FCC and Valley both argue that the "clear and convincing" standard should not apply to FCC license renewal cases (a) because of the nature of a broadcast license and renewal proceedings, and (b) because *FCC* v. *WOKO, Inc.*, 329 U.S. 223 (1946), states that denial of license renewal is not a penal measure (FCC Br. 6-7; V. Br. 13-17).[12] However, the cases relied upon by Petitioner that require "clear and convincing" proof do not turn on such factors.[13] Rather they are based on two other factors, neither of which the FCC denies is present in this case: (a) reliance on circumstantial evi-

the Court defer action on its petition until *Sea Island* is finally decided in order to avoid the possibility of a different outcome on the fundamental legal issue of the appropriate standard of proof in broadcast license termination cases. Neither the FCC nor Valley has argued against such a deferral.

[12] Rhetoric aside, it seems clear that the FCC regarded denial of KORK-TV's license renewal as a "penalty" for its alleged misconduct. Its action was not a holding of licensee unfitness, for it subsequently renewed the licenses for seven other broadcast stations which, like KORK-TV, are wholly owned by Donald W. Reynolds, who was totally absolved by the FCC of any knowledge of, or complicity in, any of the alleged misconduct at KORK-TV.

[13] *E.g.*, Collins Securities Corp. v. SEC, 183 U.S. App. D.C. 301, 562 F.2d 820 (1977); Nassar and Co. v. SEC, 185 U.S. App. D.C. 125, 566 F.2d 790 (1977). A decision by this Court as to standard of proof would eliminate evident conflict between the standard of proof governing FCC license termination cases and comparable proceedings before the SEC and other Federal agencies.

dence to prove fraud, and (b) imposition of a drastic sanction tantamount to deprivation of livelihood.[14]

Formalistic distinctions premised on the absence of any property interest in a broadcast license cloud rather than illuminate the issue.[15] For instance, this Court held that a standard even higher than "clear and convincing" was appropriate in *Woodby* v. *Immigration and Naturalization Service,* 385 U.S. 276 (1966), even though the interest at stake was "only a conditional privilege extended . . . by the Congress as a matter of grace." *Id.* at 290 (dissenting opinion). Moreover, the alleged distinctions between an SEC broker-dealer registration and an FCC license (FCC Br. 7 n.9; V. Br. 14) do not justify different standards of proof: both a broker-dealer and a broadcaster (a) cannot do business without the appropriate agency's authorization; (b) must satisfy statutory qualification standards to obtain

[14] Valley's claim of "direct" evidence of Petitioner's misconduct (V. Br. 14) is unsupported by, and indeed the record is barren of, any FCC findings based on such evidence. Its argument that "Reynolds has suffered no bar to continuing in the broadcast business—no loss of livelihood" (V. Br. 16 n.7) ignores the station managers who will likely suffer future employment impairment tantamount to deprivation of livelihood. Moreover, the question of the appropriate standard of proof transcends this case; licensees who lose their only licenses obviously will be deprived of their livelihoods.

[15] That "legitimate renewal expectancies" may derive from a showing of "meritorious service" (FCC Br. 6 n.7) does not weaken the reasons for applying the "clear and convincing" standard in this case. Western tried, but was not allowed, to make such a showing of KORK-TV's meritorious service to counterbalance the charges about its conduct. Western Communications, Inc., 41 F.C.C. 2d 581 (Rev. Bd. 1973), *review denied,* 45 F.C.C.2d 1165 (1974). *See also* Pet. App. 65a.

it; and (c) must operate in the public interest to retain it.[16]

Collins expressly rejected the argument that a penal sanction is a necessary condition to use of the "clear and convincing" standard. 183 U.S. App. D.C. at 306-07, 562 F.2d at 825-26. Moreover, even when a sanction with a remedial purpose is used "not so much to control the [licensee] as to warn others, . . . it has a significant 'penal' component, even though the courts may choose to mask its character by calling it a 'civil' remedy."[17] L. Jaffe, *Judicial Control of Administrative Action* 267-68 (1965) (footnote omitted), *quoted in Arthur Lipper Corp.* v. *SEC, supra,* 547 F.2d at 180-81 n.6. *See also* Pet. 15 n.11. It is not the label attached to a sanction that matters, but rather the "immediate hardship" it causes. *Woodby, supra,* 385 U.S. at 286. Here Reynolds—who unlike the broker-dealers in *Collins* and *Nassar* did not participate in, or even have knowledge of, the alleged misconduct—will forfeit a

[16] *Compare* 15 U.S.C. § 78 with 47 U.S.C. §§ 301, 307, 308, 309 & 312.

[17] Recent FCC "deregulation" initiatives severely undercut the FCC's expansive rhetoric about the evils of fraudulent billing (*e.g.*, "dishonesty deserving of the utmost censure" (Pet. App. 133a)) and the legitimacy of use of the agency's ultimate sanction to deter such conduct. It now appears that the agency has had a change of regulatory heart, that the "new ethic" in vogue when Petitioner's case came up has passed on, and that the FCC "soon may decide to relax or even end its enforcement of the ban" against fraudulent billing. *Wall Street Journal,* April 13, 1979, at 26. Petitioner's fate and investment should not turn on such arbitrary and capricious ebbing and flowing of regulatory tides.

huge financial investment and inevitably be stigmatized if this decision stands.[18]

The fact that the legislative history of the Administrative Procedure Act indicates that the traditional "preponderance of the evidence" standard should apply to administrative proceedings is not a reason for the Court to decline to issue the writ (FCC Br. 7 & n.8). *Collins* and *Woodby* also involved administrative proceedings. Yet in the absence of clear Congressional intent in the specific statute under which the sanction was imposed, both cases held that the appropriate standard of proof was a question for the judiciary to decide. Nothing has been cited to suggest that the Congress intended that "preponderance of the evidence" should be the standard in the instant type of license renewal case.[19] As in *Woodby,* this Court should decide the issue.

3. The Court should decide whether there is violation of an applicant's right to a fair adjudicatory agency hearing when there is premature disclosure of tentative agency decisions, and related *ex parte* conduct, in violation of specific agency rules, particularly under the egregious facts of this case. Contrary to the contentions in the briefs in opposition (FCC Br. 10-11;

[18] The concession that the "clear and convincing" standard is appropriate when protected "liberty interests" are at stake (FCC Br. 7) supports review since stigma for Reynolds and stigma plus employment impairment for Tabor and Ordonez implicate fundamental liberty interests (Pet. 16).

[19] *Compare* Terrazas v. Vance, 577 F.2d 7 (7th Cir. 1978), *prob. juris. noted,* 47 U.S.L.W. 3636 (U.S., March 26, 1979) (No. 78-1143), requiring the Government to prove loss of nationality by "clear, convincing and unequivocal" evidence despite a statute expressly providing that "preponderance of the evidence" should be the standard.

V. Br. 25), the need for review is not obviated by the fact that the "leaks" and related agency misconduct occurred after, rather than before, oral argument and issuance of FCC instructions to its staff on how to draft the still tentative decision on Petitioner's application. The Court knows well the importance of secrecy of deliberation after, as well as before, oral argument (Pet. 29-30), and hence the importance of this issue in our system of justice.

The FCC's attempt to show that premature disclosure in this case did not chill the deliberative process misapprehends *Eastern Air Lines, Inc.* v. *CAB,* 271 F.2d 752 (2d Cir. 1959), *cert. denied,* 362 U.S. 970 (1960). The relevance of that case is *not* that the deliberative process was unimpaired by a press notice announcing a tentative decision six months before release of the final decision (FCC Br. 11 n.12). Rather, the crucial point is that the two-month interval between oral argument and the press notice persuaded the Second Circuit that there had been enough time for "thoughtful consideration" of the evidence between the time of oral argument and disclosure of the tentative decision. 271 F.2d at 758. The inherent prejudice to Petitioner here resulted from the fact that the leaks first occurred only minutes after oral argument, and the "locked-in" effect began at least by the time the "leaked" information was published only six days later. The "leaks" occurred even *before* instructions were given to the staff on drafting a tentative decision on Valley's application—another part of the same proceeding.

4. **Review of the financial qualifications requirements of the Communications Act should be undertaken by the Court, especially since the District of Columbia**

Circuit has erred twice in less than two months on the issue of the sufficiency of bank letters to establish financial qualifications.[20] **Thus, its decisions threaten to have a continuing erroneous effect on administration of the Communications Act which the Court should rectify.**[21]

Review should not be denied on the ground that the issue "will not have a significant effect on the administration of the Communications Act" (FCC Br. 11). At stake is a statutory qualification standard that the agency has implemented with a reasonable and longstanding policy. Judicial tampering with this policy could have far-ranging impact. Bank loan proposals are commonplace ingredients in applications for new stations, and are often crucial in the FCC's evaluation

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[20] *See* FCC Br. 11. *See also* the FCC's February 27, 1979, memorandum in opposition (p. 3) to the petition for writ of certiorari in RKO General Inc. v. Multi-State Communications, No. 78-1089. In both cases the FCC has been of the view that the decisions of the Court of Appeals were in error. The Court of Appeals' decision in Multi-State Communications, Inc. v. FCC, —— U.S. App. D.C. ——, 590 F.2d 1117 (1978), *cert. denied,* 47 U.S.L.W. 3621 (U.S., March 19, 1979), involved a bank loan issue similar to the instant one and was relied upon by the Court of Appeals in this case (Pet. App. 10a).

[21] Contrary to Valley (V. Br. 26-30), Petitioner did not argue that the "arbitrary and capricious" standard of judicial review, rather than the "substantial evidence" standard, should have been applied in this case. *See, e.g.,* Petitioner's reliance on 5 U.S.C. § 706(2)(E) (Pet. 34) and Universal Camera Corp. v. NLRB, 340 U.S. 474, 487-88 (1951) (Pet. 37). Petitioner cited FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978), and the other rulemaking cases at Pet. 35 as "closely analogous" instances of Court of Appeals usurpation of an agency's statutory role, not as precedent for the application of the arbitrary and capricious standard to this adjudicatory case.

of an applicant's basic qualifications. Both *Multi-State* and this case turned on such proposals, and the opinions of the Court of Appeals in these cases have already demonstrated their likely significant effect on administration of the Act. *See William A. Chapman*, FCC 79-133, slip op. at 20-23 (March 5, 1979). The recurring nature of the Court of Appeals' error and its inevitable impact on the broadcast licensing process justify review.

The writ of certiorari should be granted.

Respectfully submitted,

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April 18, 1979